

IN THE COURT OF APPEALS OF IOWA

No. 2-703 / 11-1346
Filed November 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AARON JAMES DIETRICH,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, James Drew (mistrial), Chris Foy (suppression), and Rustin Davenport (trial), Judges.

Aaron Dietrich appeals his convictions for willful injury causing serious injury, criminal mischief in the third degree, and criminal trespass. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and Rachel A. Ginbey and Erica Clark, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

Aaron Dietrich requests a new trial, alleging the district court committed five errors: (1) denying his motion to suppress statements to police, (2) overruling his motion for new trial based on the weight of the evidence, (3) misadvising the jurors on justification, (4) substituting an alternate juror, and (5) excluding evidence that two State's witnesses belonged to the Ku Klux Klan. Because we find no reversible error, we affirm Dietrich's convictions for willful injury causing serious injury, criminal mischief in the third degree, and criminal trespass.

I. Background Facts and Proceedings

The jury trial record revealed the following facts. Dietrich drank two beers and as many as ten shots of hard liquor at the Other Place bar in Mason City during the early morning hours of September 1, 2010. Around closing time he accompanied his girlfriend, Nicole Johnson, to the home of her estranged husband, Greg Johnson.

That same night, Greg and his guest, Michaela Thureson, fell asleep on the couch watching movies. Greg's friend and housemate, Randall Studer, went to bed upstairs. Greg and Michaela were startled by a loud bang and found Dietrich and Nichole standing in the dining room. While Nichole screamed at Michaela, Greg told the intruders to leave and pushed them toward the door. When they reached the front porch, Greg saw at least one other person had come to his house with Nicole and Dietrich.

The shoving match continued on the porch until the men tripped down the front steps, landing on the ground. Dietrich and "the other guy" returned to their

feet and punched Greg while he was still down; Greg recalled: “they just started pounding me, just bashing my face in just repeatedly.” Greg lost consciousness several times.

Randall ran downstairs to see the front door wide open and people fighting in the yard. When the fight subsided, Randall helped Greg into the house, seeing “[h]is face was beaten beyond belief.” Before Randall could take Greg to the emergency room, Nichole and Dietrich returned to the house. Randall and Greg heard glass breaking and looked outside to see the windows in Greg’s truck were shattered. Randall told Michaela to call 911. Meanwhile Greg armed himself with a machete, and when that was wrested from him, he confronted Dietrich with a knife. Greg testified that Dietrich also had a knife and lunged at him. Greg stabbed Dietrich several times. At this point in the altercation, the police arrived.

Both Dietrich and Greg required medical care. Dietrich suffered lacerations on his left flank, left chest, and eyebrow area. The hospital discharge summary described Dietrich’s wounds as “very superficial.” Greg’s injuries were more serious; he sustained an orbital blowout and nasal bone fractures. After the assault, Greg suffered double vision, “massive migraines,” scarring, and a disfigured nose.

The State filed a three-count trial information¹ on October 22, 2010, charging Dietrich with willful injury with the intent to cause serious injury and resulting in serious injury, in violation of Iowa Code section 708.4(1) (2009), a

¹ The State also charged Nicole Johnson with criminal mischief and burglary.

class “C” felony; criminal mischief in the second degree, in violation of sections 716.1 and 716.4, a class “D” felony; and burglary in the first degree, in violation of sections 713.1, 713.3, and 703.2, a class “B” felony. Dietrich filed a notice of the defenses of justification and intoxication.

Dietrich’s first trial ended in a mistrial. His second trial started on June 7, and the jury returned its verdicts on June 10, 2011. The jury found him guilty of willful injury resulting in serious injury, as charged. On count two, the jury acquitted him of the greater offense of criminal mischief in the second degree, and convicted him of criminal mischief in the third degree, an aggravated misdemeanor in violation of Iowa Code section 716.5. On count three, the jury acquitted Dietrich of first-degree burglary, and convicted him of the lesser offense of criminal trespass, a serious misdemeanor in violation of Iowa Code section 716.8(2).² The court denied Dietrich’s motion for new trial and sentenced him to indeterminate terms of ten years and two years, to run concurrently. He received thirty days with credit for time served on the trespass count. Dietrich filed a timely notice of appeal.

II. Motion to Suppress

At trial, Dietrich moved to suppress statements he made to law enforcement in the emergency room and later in his hospital room. Dietrich alleged his statements were not voluntary because he was highly intoxicated (his blood alcohol concentration was .30 when he arrived at the hospital), and

² The district court correctly characterized this offense as a serious misdemeanor at the sentencing hearing. But the judgment entry incorrectly cites to section 716.8(1), and Dietrich repeats that incorrect citation in his appellate brief.

medical personnel gave him a strong narcotic for his pain. He also alleged he was in custody during the interviews and not advised of his Miranda rights. The court granted his motion to suppress the statements obtained at the emergency room as involuntary, but denied the suppression motion as to the later interview in his room.

On appeal, Dietrich argues only that his statements were not “freely and voluntarily given” due to the effects of his intoxication, his pain medication, and the “traumatic stabbing he had experienced just hours prior to the interrogation.” See *State v. King*, 492 N.W.2d 211, 215 (Iowa Ct. App. 1992) (“To be admissible as evidence, incriminating statements made by a defendant must have been made voluntarily.”). The State contends Dietrich waived his suppression argument on appeal by not identifying any incriminating statements he made to the police and by failing to argue how their admission resulted in prejudice.

We agree that Dietrich’s appellate argument is too incomplete to preserve his suppression claim. The district court’s suppression ruling notes that the officers interviewed Dietrich in his hospital room, starting just before noon, for almost an hour. Nothing in Dietrich’s appellate brief alerts us to what parts of that conversation were offered into evidence at trial or how he was prejudiced by their admission. We conclude Dietrich has waived any argument with respect to the prejudicial admission of his allegedly incriminating statements. See *State v. Piper*, 663 N.W.2d 894, 914 (Iowa 2003) (refusing to assume partisan role and undertake the defendant-appellant’s advocacy), *overruled on other grounds by*

State v. Hanes, 790 N.W.2d 545, 551 (Iowa 2010). We decline to grant relief on this ground.

III. Motion for New Trial

Dietrich next challenges the district court's denial of his motion for new trial, arguing the jury's verdict was contrary to the weight of the evidence under Iowa Rule of Criminal Procedure 2.24(2)(b)(6). He argues no credible evidence supported (1) his intent to commit serious injury; (2) the resulting serious injury to Greg Johnson; or (3) the absence of justification.

The district court had broad discretion to rule on the new trial motion. See *State v. Nichter*, 720 N.W.2d 547, 559 (Iowa 2006). We only reverse when the court abuses that discretion. *Id.* Our supreme court has cautioned trial courts that failure to use this discretion "carefully and sparingly" will "lessen the role of the jury as the principal trier of the facts and would enable the trial court to disregard at will the jury's verdict." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998); see *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) (reserving grant of new trial for "extraordinary case" where evidence "preponderates heavily" against the verdict).

The district court properly exercised its discretion in deciding the willful injury verdict was not against the weight of the evidence.³ The jurors were entitled to infer Dietrich's intent and lack of justification from testimony that he entered Greg's house without permission, and when pushed outside, instead of retreating to the vehicle he arrived in, repeatedly struck Greg in the face until

³At trial, Dietrich did not argue the criminal mischief verdict was against the weight of the evidence. Accordingly, that challenge is not preserved for appeal.

Greg lost consciousness. The jury also could find the resulting serious injury from Greg's testimony concerning the facial fractures he sustained, as well as the medical records offered into evidence. The evidence here did not preponderate heavily against the verdict.

IV. Instruction on Reasonable Force

In his third assignment of error, Dietrich claims the district court erred in providing the jury with a reasonable force instruction, which stated:

Greg Johnson may lawfully use reasonable force to prevent or stop an unlawful interference with his property. Greg Johnson's use of force was not lawful if:

1. Greg Johnson started or continued the incident.
2. Greg Johnson did not believe he was in imminent danger of losing the property and the use of force was not necessary to prevent its loss.
3. Greg Johnson did not have reasonable grounds for the belief.
4. The force used by Greg Johnson was unreasonable.

At trial, Dietrich's counsel objected to this instruction, arguing: "Greg Johnson is not on trial here and that instruction is improper [because] it creates a kind of an inference that if Greg Johnson is justified then Aaron Dietrich is not justified and I do not believe that's appropriate" The State asserted the instruction was an accurate statement of the law and necessary to inform the jury that an individual has the right to protect his property. The court overruled the defense objection, finding it appropriate to "give the jury some instructions as to what Greg Johnson's rights were."

On appeal, Dietrich contends the instruction constituted reversible error because it confused the jury and created a misimpression that he bore a burden to show Greg's actions were not justified as a means to show that his own

actions were justified. The State responds that when read together, the instructions adequately informed the jury concerning the defendant's justification defense and the disputed instruction did not create confusion.

We review Dietrich's jury instruction challenge for legal error. See *State v. Becker*, 818 N.W.2d 135, 140 (Iowa 2012). Error in giving a particular instruction warrants reversal unless the record shows no resulting prejudice. *Id.* at 141. In evaluating whether the instructions convey the applicable law, we read all of them together, "not piecemeal or in artificial isolation." See *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa Ct. App. 1993).

Here, the disputed instruction borrows from Iowa Criminal Jury Instructions 400.1 and 400.4. But the uniform instructions do not contemplate the jury will be informed of the rights of the alleged victim, as opposed to the justification defense raised by the defendant. The district court candidly acknowledged the instruction was somewhat novel: "frankly I would feel more comfortable if I had a little more support regarding that." On appeal, the State cites a case from the Connecticut Supreme Court approving of a jury instruction spelling out "the victim's right to defend the premises in order to inform the jury that the victims did not have the same duty to retreat as did the defendant." See *State v. Amado*, 756 A.2d 274, 281 (Conn. 2000).

Without sanctioning the jury instruction defining reasonable force by the alleged victim, we find the trial record affirmatively demonstrates Dietrich suffered no prejudice from the jury's introduction to the rights of individuals confronted in their homes. Neither on appeal nor at trial does Dietrich contest the correctness

of the law in the instruction. His challenge is to its potential to confuse the jurors regarding burdens of proof. The instructions as a whole accurately guided the jurors to consider Dietrich's claim of justification and communicated the State's burden to prove the elements of willful injury and to disprove the justification defense. Because his defense was not harmed by the disputed instruction, Dietrich is not entitled to reversal on this ground.

V. Substitution of Alternate Juror

Dietrich claims he is entitled to a new trial because the court violated rule 2.18(15) by substituting an alternate juror during deliberations. The language of the rule bearing on this question reads as follows: "Alternate jurors shall . . . replace any juror who becomes unable to act, or is disqualified, before the jury retires, and if not so needed shall then be discharged." Iowa R. Crim. P. 2.18(15).

Our court has interpreted this rule as prohibiting the substitution of alternate jurors for seated jurors during deliberations.⁴ *State v. Escobedo*, 573 N.W.2d 271, 276 (Iowa Ct. App. 1997). "Our rules only permit the replacement of a regular juror prior to the commencement of the deliberations and require alternate jurors to be discharged after the deliberations begin." *Id. Escobedo* determined the district court lacked authorization to replace a juror during deliberations, and the defendant would have been entitled to a mistrial had he sought one. *Id.* But because the defendant acquiesced in the replacement of

⁴ At the time we decided *Escobedo*, Federal Rule of Criminal Procedure 24(c) did not permit the replacement of a juror during deliberations. The rule was amended in 1999 to allow federal courts to retain alternate jurors after the jury retires to deliberate. See Fed. R. Crim. P. 24(c)(3).

the dismissed juror, our court held the defendant waived the jury irregularity. *Id.* at 276–77.

The situation here differs from *Escobedo* because Dietrich’s jury had not started deliberating when the court substituted an alternate juror. Dietrich’s jury received its final instructions late in the afternoon after closing arguments. The court gave the jurors a separation instruction, permitting them to leave as soon after 5 p.m. as they desired. They went back to the jury room, but did not even sit down, before deciding to go home for the night. The deliberations were to begin the following morning, but one of the jurors did not show up. The court proposed calling back an alternate juror to serve on the jury. The defense moved for a mistrial.⁵ The court overruled the motion and substituted the alternate juror, after ensuring that she had followed the admonition overnight.

On appeal, Dietrich claims the court abused its discretion in denying the mistrial motion. See *State v. Delaney*, 526 N.W.2d 170, 177 (Iowa Ct. App. 1994). We find no abuse of discretion on this record.

Rule 2.18(15) allows replacement of a juror before the jury retires. Dietrich does not address the meaning of the term “retire” in his brief, but his overall argument suggests that by entering the jury room, the jury retired for deliberations. We do not interpret the term “retire” so rigidly. See *Martin v. United States*, 691 F.2d 1235, 1239 (8th Cir. 1982) (concluding that under federal rule “retiring means more than simply leaving the courtroom, but requires

⁵ Defense counsel moved for a mistrial “with dismissal of all charges with prejudice or in the alternative, if that motion is not granted, then to proceed as the court intends.” The court clarified that the defendant was not entitled to a dismissal with prejudice.

retirement to deliberate or consider the verdict”); *see also United States v. Cohen*, 530 F.2d 43, 48 (5th Cir. 1976) (equating term retire with beginning deliberations). Where, as here, the district court determines the jury has not yet started deliberating, substitution of an alternate juror is allowed under rule 2.18(15). The court did not abuse its discretion in denying the motion for mistrial.

VI. Evidence of Ku Klux Klan Membership

In his final claim, Dietrich contends the district court abused its discretion in excluding evidence that Greg Johnson and Randall Studer were members of the Ku Klux Klan. Dietrich argued at trial that their affiliation was admissible to show bias and their admitted willingness to “lie for each other.” The prosecutor asserted the “KKK evidence” was inadmissible under the balancing test in Iowa Rule of Evidence 5.403. The prosecutor argued the defense would be “able to show bias of witnesses by establishing the friendship that exists between Randall and Greg and has existed for a long time.”

The district court ruled that “injecting the KKK membership is unduly prejudicial” under rule 5.403 and reasoned that the close relationship between the State’s witnesses can “come in without the necessity of getting into membership in the KKK.” In denying this ground in the motion for new trial, the court stated:

For good reason, the KKK is reviled as an institut[ion], and introduction of such information would have . . . prevented the State from obtaining a fair trial with little probative value. The court finds that evidence regarding Johnson’s association with the KKK was properly excluded.

On appeal, Dietrich renews his argument that their Ku Klux Klan memberships were relevant to show the witnesses' bias "as it goes directly to the credibility of Greg Johnson and Randall Studer."

We afford district courts broad discretion in conducting the rule 5.403 balancing test. See *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004) (recognizing "wise judges may come to differing conclusions" and giving "much leeway to trial judges who must fairly weigh probative value against probable dangers"). In determining whether the court abused its discretion in excluding certain evidence, we look to the offering party's need for that proof in light of the fighting issues and the other available evidence. Cf. *id.* at 129 (assessing evidence of defendant's prior bad acts).

The credibility of Greg Johnson and Randall Studer was important to the State's case. As the jury tried to piece together what happened in the early morning hours of September 1, 2010, on several points it was their word against that of the defense witnesses. But Dietrich had means to show the potential bias of the State's witnesses separate from their membership in the Ku Klux Klan. For instance, during her cross-examination, defense counsel elicited testimony from Randall that he had known Greg since they were small children and sometimes they called each other "Brother Greg" and "Brother Randall." When asked whether he would lie for Greg Johnson, Randall testified: "Depending on the circumstances." In closing argument, defense counsel highlighted Randall's admission that "he would lie for his friend." Given defense counsel's ability to expose Randall's bias toward his long-time friend through other evidence, their

joint affiliation with the Ku Klux Klan carried less probative force. The court did not abuse its discretion in excluding the proffered evidence.

AFFIRMED.